IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3257 of 1991
with
SPECIAL CIVIL APPLICATION NO 3258 of 1991
with
SPECIAL CIVIL APPLICATION NO 3259 OF 1991

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA. and
MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes

2. To be referred to the Reporter or not? Yes

3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

GARDEN SILK MILLS PVT. LTD.

Versus

DY. COMMISSIONER OF INCOME-TAX

Appearance:
MR JP SHAH for Petitioner
MR BB NAIK for MR RP BHATT for Respondent No. 1

CORAM : MR.JUSTICE R.BALIA. and
MR.JUSTICE A.R.DAVE

Date of decision: 24/11/98

ORAL JUDGEMENT (per R. Balia, J.)

In the identical facts and circumstances,

identical issue has been raised in all these three petitions, the same are being heard and decided together.

2. For the purpose of revealing the controversy raised in all these petitions, we shall refer to the facts of Special Civil Application No. 3257/91.

3. The petitioner is a private limited company and an assessee under the Income-tax Act. The petitioner challenges notice under sec. 148 for reassessment of its income for the Assessment Year 1986-87. The notices were issued on 7.3.1990. The petitioner had submitted return of its income foro A.Y. 1986-87 on 30.1.87 disclosing an income of Rs. 4,46,04,420/- as per the statement of income filed alongwith the return. Thereafter, the petitioner-company filed a re-computation of total income alongwith the revised return. In the said re-computation, the petitioner added to the total income of original return a sum of Rs. 18,76,126/- which it had claimed by way of deduction for the A.Y. 1985-86 which was the component of the valuation of the closing stock for that year by way of adjustment as a result of operation of sec. 43B of the Income-tax Act and was allowed for that year. As the aforesaid amount as component of the closing stock for the A.Y. 1985-86 had been allowed as deduction for that year, to make necessary adjustment in computation of total income for A.Y. 1986-87, the said amount was sought to be added in the total income of the A.Y. 1986-87. The second modification which was sought through revised return was for adjusting the value of closing stock for that year by excluding the component of custom duty as a consequence of its treatment under sec. 43B of the Income-tax Act. Thus, the revised return was in respect of adjusting the value of opening stock as well as closing stock by giving effect to adjustment already made in the previous year in the light of provisions of sec. 43B and for making same adjustment for the current year's closing stock. During the course of assessment proceedings an inquiry into this claim was directed towards assessee by the assessing officer which was replied by letter dated 9.3.87 which included explaining reason for claiming modification in adjustment of value of opening stock as well as closing stock. This claim was in consonance with a Bench decision of this Court in Lakhanpal National Ltd. v. Income-tax Officer, 162 ITR 240. Thus, in the assessment for the A.Y. 1986-87 custom duty included in the opening stock having been paid in A.Y. 1985-86 but excluded from the valuation of the closing stock for 1985-86 in the assessment of that year which resulted in reducing the

value of closing stock in A.Y. 1985-86 wad adjusted by reducing opening stock in trade for the A.Y. 1986-87 by the like amount to make it in consonance with the closing stock of the previous year taken into account for the purposes of computing income of that year. Likewise, on the same principle, custom duty paid on closing stock was deleted reducing the value of the closing stock for A.Y. 1986-87 which may result in reduction of the value of opening stock for A.Y. 1987-88.

4. In the first instance notice under sec. 147 dated 7.3.90 was issued for the A.Y. 1986-87 which was challenged by the present petitioner by way of S.C.A. No. 3557/90. After issuance of rule, on submission being made by the Department that the impugned notice shall be withdrawn, S.C.A. No. 3557/90 was not pressed at that time. As the petition was dismissed with liberty to issue proper notice in accordance with law, the impugned notices were issued on 27.3.91 which has been challenged by way of this petition.

5. The petitioner contends that question about operation of sec. 43B in he case of the petitioner who is maintaining his books of account on mercantile basis and as a result of its applicability adjustment in the value of closing stock as disclosed in books of account while computing income chargeable to tax under the provisions of the I.T. Act had been duly considered by making inquiry into the claim of the petitioner on that basis and has been allowed by the Assessing Officer after application of mind. The claim of the assessee was supported by a Bench decision of this court in Lakhanpal's case (supra). That decision has not been reversed or overruled in any other decision. In fact, this court recently in C.I.T. v. Cadila Chemicals Pvt. Ltd. 230 ITR 885 has reiterated that the issue decided in Lakhanpal's case (supra) does not require reconsideration when similar question was again sought to be raised by way of Reference Application under sec. 256(2) in Cadila Chemical's case. This being a case of mere change of opinion it was not open to Assessing Officer to have recourse to sec. 147. Section 147 does not confer any jurisdiction on the Assessing Officer to review his own order on a mere change of opinion.

5. Learned Counsel for the Revenue has urged that the ITO, for reasons recorded in writing, had reason to believe that income of the assessee had escaped assessment which is attributable to underassessment as a result of wrong allowance of deduction by way of adjustment of the value of closing stock of the custom

duty payable on that stock and one that conclusion is reached, no further enquiry into the validity of the reason is envisaged at this stage. This is not the stage to examine the correctness or otherwise of the opinion so held by the Assessing Officer which is domain of subjective satisfaction.

6. We have carefully considered the rival contentions. This court had occsion to consider scope of sec. 147 as amended with effect from 1.4.89. It would be profitable to have reference to it. In VXL India Ltd. v. Assistant Commissioner of Income-tax, 215 ITR 295, the court opined,

> "We are also of the view that howsoever wide the scope of taking action under sec. 148 of the Act, it does not confer jurisdiction on change of opinion on the interpretation of a particular provision earlier adopted by the assessing authority. For coming to the conclusion whether there has been excessive loss or depreciation allowance or there has been underassessment or assessment at a lower rate or for applying other provisions of Explanation 2, it must be on material and it should have nexus for holding such opinion contrary to what has been expressed earlier. The scope of section 147 of the Act is not for reviewing its earlier order suo motu irrespective of there being any material to come to a different conclusion apart from just having second thoughts about the inferences drawn earlier."

7. The principle was reitereated in Birla VXL Ltd. vs. Assistant Commissioner of Income-tax, 217 ITR 1, in which petitioner's own case for a subsequent assessment year relevant to A.Y. 1992-93 when notices under sec. 148 were issued on 5.2.95 relating to escapement of income which included issue similar to one at hand about allowance of adjustment in respect of excise duty paid on yarn included in closing stock of yarn, the court opined, after holding that there has been no failure on the part of the assessee to disclose truly and correctly material for the purpose relevant for assessment: "The Assessing Officer cannot take any action under this section merely because he happened to change his opinion or to hold an opinion different from that of his predecessor on the same set of facts. From the earlier assessment which clearly assumes that the Assessing Officer applied his mind to the computation of income and therefore in a case like this it would not be open to the Assessing Officer

to issue notice under sec. 148 of the Act."

8. The fact that present case relates to like adjustment about the custom duty and not the excise duty will make no difference.

9. The question was again discussed at some length by another Division Bench of this court in Praful Chunilal Patel v. M.J. Makwana, Asst. Commissioner of Income Tax, (1998) 148 CTR 62. It was a case in which notice under sec. 147 had been issued. Recording of reasons disclosed that a part of item of income though disclosed as per information submitted by the assessee, had remained to be considered for assessment and therefore the income has been underassessed. It was submitted on behalf of the assessee that all facts were correctly disclosed and were on record during the assessment proceedings relevant to A.Y. 1991-92 and the order was made by the Assessing Officer after seeking details. It should be assumed that he has consciously not taxed the income which is now sought to be looked into by him. It was emphasised that it should be assumed that the Assessing Officer had formed an opinion that there was no transfer and hence, no capital gains accrued.

10. The case of he Revenue had been, on the other hand, that the facts about the valuation of bungalow and distribution of such value among partners of M/s. Krishnan Enterprises, of which the petitioners in that case were partners, were found in the assessment of the firm and protective assessment was made and the Assessing Officer had observed that proceedings under sec. 148 of the Act are separately required to be taken. In nutshell, the case of the revenue was that the erroneous nature of original assessment order and reason to believe about underassessment of the income of the relevant assessment year was entertained as a result of detection about its erroneous nature on the facts which have been referred to in the assessment order of the firm. It was also the case disclosed in the reasons that it was a case of assessee, who by appending note to his return, has tried to mislead the Assessing Officer at the time of original assessment about the nature of transaction.

11. The first premise which the court took into consideration is that the cases of underassessment or excessive relief which are deemed cases of escapement of income leave no scope for an argument that they are not the cases of income having escaped assessment. There cannot be any doubt about this proposition. It arises in

every case where an assessment results in lesser collection of revenue than what it ought to be. But, as it is noticed, reason to believe that there has been escapement of assessment must not be a pretence or change of opinion but must be founded on material having reasonable nexus to the formation of opinion about escapement of income. The sufficiency or adequacy of such material, so far it exits, some nexus between the material and the formation of opinion, is not subject-matter of judicial scrutiny nor holding of such belief on that basis can be challenged which is subjective in nature, giving jurisdiction to issue notice and initiate proceedings for reassessment. However, the court, while considering the contention about change of opinion observed, "while considering the cases referred to above change of opinion would mean where, if there is conscious application of mind on the earlier occasion and the assessment is result of such conscious application of mind to the issue which is sought to be reopened. That there has been no conscious application of mind, in the first instance, question of change of opinion would not arise. It would be then formation of opinion for the first time about the erroneous nature of assessment resulting in escapement".

12. The court, while considering earlier decisions of this court in Garden Silk Mills vs. Dy. CIT, 222 ITR 27 and of the same assessee another case reported in the same volume at page 68, said,

> "Even the decision of this court in Garden Silk Mills vs. Dy. CIT (supra) cannot assist the petitioner because in that case it was held that the AO was aware about the investment and fluctuations in the exchange rate and depreciation had been allowed after considering the material on record and further that the notice was issued after four years and there was no failure on the part of the assessee to disclose material facts necessary for the assessment. Reliance placed on the case of that very assessee, reported in the same volume at page 68 also cannot help the petitioner, because in that case the court found that in the first assessment the Assessing Officer had applied his mind in the computation of income and that there was a mere change of opinion. When, at the first assessment all the relevant aspects are considered and there is proper applicability of mind for ascertainment of the amount of taxable income and of the tax payable thereon, then in

> the absence of any error or mistake being discovered or found, the Assessing Officer later on cannot merely for the sake of giving a different opinion, change the earlier opinion. However, in cases where an error or mistake is detected, it can never be said that there is only a mere change of opinion. The mistake or error which is detected and which constituted a valid decision or cause to form a belief in the first assessment as a result of which the income has escaped assessment, would constitute a reason to believe that the income had escaped assessment and such cases where mistakes and errors are detected and which constitute a valid justification or cause to form a belief sought to be corrected, cannot be said to be cases of mere change of opinion."

13. We are in respectful agreement with the aforesaid enunciation of distinction between change of opinion and finding erroneous nature of earlier assessment on detection of mistake on an issue which was not earlier considered by the assessing officer. The present case may be examined in the light of principles noticed above. No return has been filed. However, reasons recorded by the assessing officer has been placed on record which are identical in all the three cases except for the amount and the name of the assessee.

14. The reason in terms disclosed that on an earlier occasion assessee has claimed the amount of custom duty forming part of closing stock value, by way of a deduction in the computation of net taxable income on the ratio in the case of Lakhanpal's case (supra) and it was not disallowed by the assessing officer while completing the assessment under sec. 143(3). It further refers that for the reason that due diligence was not exercised by the assessing officer. This part of non-exercise of due diligence on the part of the assessing officer firstly excludes the possibility of want of true and correct disclosure on the part of the assessee being the cause of such escaped assessment. However, non exercise of due diligence cannot be equated with lack of application of mind on the part of the assessing officer, particularly in view of fct noticed in the reasons that claimof the assessee was founded on a decision of this court and the allowance was in accordance with it.

15. The reasons recorded by the Assessing Officer which led to belief about the escapement of assessment disclose that the present case is nothing but mere change

of opinion on the facts which were already before the Assessing Officer while making the first assessment to which conscious application of mind is reflected from the proceedings, and allowed in the computation and which has not been disputed by the Revenue. The claim of the assessee has been accepted after considering in the light of the decision rendered by this court. The reasons do not even disclose that the assessing officer issuing notice even entertained doubt about the applicability of ratio of Lakhanal's case to the facts of the case, nor it entertained any belief that the decision has since ceased to be operative. The reference to later decision of the Supreme Court in C.I.T. v. British Paints India Ltd. 188 ITR 45, in our pinion, has no relevance or bearing on the controversy with reference to which the assessment for the A.Y. 1986-87 is sought to be reopened by the Assessing Officer. Learned Counsel for he Revenue has not been able to point out how and in what manner the decision in British Paints's case has any relevance to the controversy about the claim of the assessee seeking adjustment in valuation of closing and opening stocks while computation of taxable income pursuant to operation of sec. 43B which has been decided by this court in Lakhanpal's case. The reasons recorded by he Assessing Officer do not even reflect that he has any reason to believe that earlier decision of this court in Lakhanpal's case has been rendered ineffective by any later decision. On the contrary, as we have noticed above, the decision has been reiterated and held to be beyond reconsideration by this court in a recent decision in Cadila Chemical's case (supra).

16. Without there being any material before the Assessing Officer on the basis of which he could hold belief about the correctness of a decision rendered in Lakhanpal's case, which is the decision of the jurisdictional High Court and binding on him otherwise, the Assessing Officer could not hold reason to believe that the income has escaped assessment due to application of Lakhanpal's decision by the original Assessing Officer.

17. It may further be noticed that for the like allowance claimed by the assessee foro the A.Y. 1992-93 after the issuance of the impugned notices in this case, the Assessing Officer has allowed the very same claim notwithstanding issuanceof notices under challenge in respect of like claim. When the assessment for 1992-93 was sought to be reopened on the alleged erroneous nature of the allowance made in the original assessment, this court in assessee's own case has quashed the notice on

the ground that it is mere change of opinion in Garden Silk Mills Ltd. v. Deputy C.I.T., 222 ITR 68.

18. Reference to unsustainable claim of deduction for the said amount put forward by the assessee not forming part of the audited Profit & Loss A/c of the assessee is also a non-existent reason for the purpose of giving jurisdiction to the Assessing Officer. It is not the case that by not disclosing the audited Profit & Loss A/c the assessee led claim dehors his account books. As noticed while narrating facts, assessee has sought adjustment in the valuation of stock-in-trade as disclosed in the audited books of account on the ground of applicability of sec.43B of the Income-tax Act as the assessee is maintaining his books of account on mercantile system. It is on that premise the enquiry was made and claim was investigated and allowed. Camouflaging language of framing reasons Assessing Officer cannot confer upon himself jurisdiction which does not exist. The consistent view of this court is that even after amendment of sec. 147 mere change of opinion does not confer jurisdiction on the ITO to initiate proceedings for reassessment merely by resorting to explanation 1 on the basis of change of opinion. On the facts of this case the reasons recorded by assessing officer disclose no more than mere change of opinion.

19. As a result, these petitions succeed. The impugned notices in each case for initiating reassessment proceedings for the A.Y. 1986-87 are quashed. Rule is made absolute in each case. There shall be no order as to costs.

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